Petition

81-2031

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAMS ENTERPRISES, INC.,
Petitioner,

vs.

THE BINKLEY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the provisions of the Williams/Binkley contract incorporate by reference the "no damages for delay" clause in the Binkley/prime contract or only those terms which pertained to the character and manner of the work being performed?
2. Was the "extra work" provision in the Williams/Binkley contract waived by the parties?
3. Does the "extra work" provision in the Williams/Binkley contract preclude recovery of the additional cost that Williams incurred performing work required under its original contract?
4. Did Binkley breach its contract with Williams by failing to properly coordinate and administer its contract?
5. Did Binkley breach its contract with Williams by not providing a ready site for the work on June 26, 1978?
6. Did Binkley breach its contract with Williams by failing to adjust the shipping sequence after Binkley had breached its contract by failing to provide a ready site?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit from which petitioner[1] seeks

[1]In accordance with the Supreme Court Rules, the petitioner states its parent corporation is Williams Industries, Incorporated. The following corporations are affiliated with the petitioner by direct equity ownership by Williams Industries, Incorporated:

Williams Miscellaneous Erection Company
Williams Steel Erection Company, Inc.
Cranes Unlimited, Inc.
Dominion Caisson Corporation
Commercial Manufacturing & Repair Company, Inc.
L.A. Melka Marine Construction & Diving Company, Inc.
Piedmont Metal Products, Inc.
Bridge & Paving Services, Inc.
Delaware Valley Erectors, Inc.
Laugro Company, Inc.
C. William Hartman, Inc.
John F. Beasley Construction Co.
Atlas Machine & Iron Works, Inc.

The following corporations are affiliated with the petitioner by equity

certiorari appears in the Appendix hereto at page A-2. The subsequent Order issued by the United States Court of Appeals for the Fourth Circuit denying the petitioner's petition for rehearing appears in the Appendix hereto at page A-1. The Memorandum Opinion and Judgment of the trial court also appears in the Appendix hereto at page A-5.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on December 18, 1981. A timely petition for rehearing was filed on January 4, 1982; an Order denying the petition for rehearing was entered on February 2, 1982. This petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition for writ of certiorari arises from the construction of the Experimental Estuary Water Treatment Plant located in Washington, D.C. The Binkley Company (hereinafter sometimes referred to as "Binkley") entered into a written subcontract with the prime contractor. The prime contractor entered into a written prime contract in the sum of $5,777,000.00 with

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ownership of one or more of the principals of the petitioner:

Atlanta Steel Erectors, Inc.
Dano Resource Recovery, Inc.
WillFab, Inc.
Williams Enterprises of Georgia, Inc.

In addition, equity ownership by one or more of the preceeding corporations exists in:

Mobile Foundation Company
S.I.P., Inc.

the United States Government, the owner. The petitioner, Williams Enterprises, Inc. (hereinafter sometimes referred to as "Williams"), entered into a written sub-subcontract in the sum of $39,000.00 with Binkley to perform certain metal siding erection work.

The amended complaint filed in District Court by Williams against Binkley was for the collection of the amounts due for (1) the retention due under the sub-subcontract, (2) the value of the extra work performed by Williams and (3) damages for breach of contract by Binkley. Jurisdiction was based upon 28 U.S.C. § 1332, as there was diversity of citizenship between the parties and the case or controversy exceeded $10,000.00, exclusive of interest and costs.

Binkley denied liability and filed a counterclaim and plea of set-off alleging that Williams was liable for the cost of completing and correcting certain defective work.

The matter was heard before the Magistrate by consent of the parties on January 26, 1981. The Honorable Elsie L. Munsell decided the case without a jury in the United States District Court for the Eastern District of Virginia, Alexandria Division (hereinafter sometimes referred to as "District Court"). The District Court held (1) that Binkley was not liable for the damages for the alleged breach of contract and (2) that Williams was entitled to certain moneys for retention and extra work less an allowance for certain back charges. Williams timely appealed the District Court's decision denying its claim to the United States Court of Appeals for the Fourth Circuit.

The United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court holding that Binkley was not responsible for the delays and also that Williams' delay claims were barred by a "no damages for delay" clause contained in the contract between Binkley and the prime contractor.

There were numerous occasions during the construction work when Williams was required to perform work beyond the contract requirements. (C.A. App. 92-95).[2] Williams advised Binkley that the inconsistencies and variances would increase the cost of Williams' work. (C.A. App. 53, 61). Binkley understoon that Williams intended to hold Binkley responsible for these costs. (C.A. App. 55-56).

The evidence was undisputed that Williams' work should have been completed in forty-five days (C.A. App. 163-165) instead of being stretched out to a one-year project. The evidence was further undisputed that Williams' damages as a result of delays incurred and additional work performed were $74,034.00.

ARGUMENT

1. Did the provisions of the Williams/Binkley contract incorporate by reference the "no damages for delay" clause in the Binkley/prime contract or only those terms which pertained to the character and manner of the work being performed?

The United States Court of Appeals for the Fourth Circuit held in part that:

> ". . .Paragraph II of the Agreement specifically provided that Williams assumed toward Binkley all of the obligations and responsibilities that Binkley assumed toward Remsco under the base contract as well as the contract between Remsco and the Owner. Additionally, the Agreement incorporated all portions of the base contract dealing with the manner in which the work was to be performed. . . " (A-3).

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[2] "C.A. App." refers to the Appendix filed with the United States Court of Appeals for the Fourth Circuit.

Williams contends that the Fourth Circuit's holding is in error and that the incorporation by reference of the Binkley/prime contract was limited to the obligations and responsibilities pertaining only to the manner and character in which the work was to be performed.

The sub-subcontract entered into between Williams and Binkley provides in part as follows:

"WHEREAS, Binkley is entering into a contract dated November 8, 1977 as subcontractor with Remsco Associates & Foster-Newman Contracting Company to *furnish all materials, labor, equipment and supervision required for the complete installation* of the performed metal siding and related accessories, for the completion of the Experimental Estuary Water Treatment Plant located at Washington, D.C.; *all work in accordance with plans and specifications*; work to commence approximately the week of June 26, 1978; a copy of which is attached hereto and by express reference made a part hereof and hereinafter referred to as the 'Base Contract', and

"WHEREAS, Binkley and Erector [Williams] desire to enter to into an agreement whereby Erector [Williams] will furnish all of the labor and equipment ot perform all of the erection work in connection with the undertaking of Binkley in the said Base Contract,

WITNESSETH:

"That Erector [Williams] and Binkley for the consideration hereinafter named agree as follows:

"1. Erector [Williams] will furnish all of the labor equipment and services and do and

perform all things required to be done and perfomed by Binkley under the terms and conditions of the Base Contract, other than the furnishing of the material to be erected and installed, which material will be delivered to the job site by Binkley on board trucks.

. . .

2. Erector [Williams] assumes toward Binkley all of the obligations and responsibilities that Binkley assumes toward the General Contractor and the Owner as set forth in the Base Contract and in the contract between the General Contractor and the Owner, and in the general and special conditions, drawings, specifications and other documents therein and in the Base Contract referred to, *insofar as applicable*, generally or specifically, *to the work performed under this Agreement*, and Binkley shall have all rights as to the Erector [Williams] which the General Contractor has to Binkley in the said Base Contract and conditions, etc. therein referred to. These documents are available at all reasonable times for examination of the Erector [Williams] at the office of the General Contractor, Remsco Associates & Foster-Newman Contracting Company, and Erector [Williams] hereby acknowledges the opportunity to examine said documents prior to executing this agreement." (Emphasis added.) (C.A. App. 21-22).

The opinion of the Fourth Circuit in this action is in conflict with the prior decisions of this Court. The Supreme Court of the United States held in *Guerini Stone Company* v. *P.J. Carlin Construction Company*,

240 U.S. 264, 36 S.Ct. 300, 60 L.Ed. 636 (1916) that the drawings and specifications were referenced in the subcontract for the limited purpose of indicating what work and in what manner the work was to be performed by a subcontractor. The Supreme Court held in part as follows:

> "[I]n our opinion the true rule, based upon sound reason and supported by the greater weight of authority, is that in the case of subcontracts, as in other cases of express agreements in writing, a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified.
>
> ". . .and that the ruling of the trial judge holding plaintiff bound by the provisions of the general contract, so as to be obliged to submit to delays resulting from the action of the government, were erroneous."*Id.* at 277.

The law of the District of Columbia which is the law that should have been applied in this action has also clearly been interpreted to be that the incorporation of a prime contract into a subcontract is "for the limited purpose of specifying 'the work' to be performed." *John W. Johnson, Inc.* v. *Basic Construction Co.*, 429 F.2d 764 (D.C. Cir. 1970) and *Washington Metropolitan Area Transit Authority* v. *Norair Engineering Corporation*, 553 F.2d 233 (D.C. Cir. 1977).

In *John W. Johnson, Inc., supra*, the Court clearly stated:

> "Basic [prime contractor] contends that it was relieved of the obligation of furnishing such commitment under the circumstances because the subcontract fully integrated the terms and conditions of the prime contract and thus

> operated to bind Johnson [subcontractor] to the same terms. . .*the prime contract was only incorporated for the limited purpose of required compliance with the terms and provisions of the prime contract insofar as same were applicable to the work to be performed and did not extend to require adherence by the subcontractors to administrative remedies and decisions* thereunder by the parties to the prime contract . . .
>
> "This binds the subcontractor to the terms and provisions applicable 'to the work,' *and we construe this to mean to the character and manner of the work to be done by the subcontractor. Guerini Stone Co.* v. *P.J. Carlin Construction Co.*, 240 U.S. 264, 277, 36 S.Ct. 300, 60 L.Ed. 636 (1916). Also, the subcontractor was not a party to the prime contract and he was not made privy to its provisions by having it incorporated by reference into its subcontract." (Emphasis added.) *Id.* at 772-773.

The prime contractor relied upon the following language in the prime/sub contract in arguing that certain provisions were incorporated by reference:

> " 'The subcontractor * * * agrees to * * * perform all work required by the above mentioned contract [the prime contract] * * * for furnishing and performing painting, finishing, vinyl wall covering work, etc., in accordance with the requirements of the prime contract documents, plans, specifications, general conditions, special conditions, addenda * * * and alternates * * *

and as described more completely in Exhibit A * * * *' " *Id.* at 774-775.

The Court held:

> "This incorporates the prime contract into the subcontract by reference, but we have previously noted in discussing the extra work provisions, that this was for the limited purpose of specifying 'the work' to be performed. . .the Disputes Clause was not *specifically* incorporated by reference and it relates to a procedural matter which is further removed from 'the work' contemplated by the contracts." (Emphasis in quoted text.) *Id.* at 775.

In *Washington Metropolitan Area Transit Authority, supra* at 235, the Court stated that the policy underlying their holding was that "In the absence of express contractual language, it cannot be assumed that the subcontractor intended to forfeit or condition his right to recover. . ." The subcontract incorporated the prime contract by reference and the Court stated that:

> "As Noralco argued below and the District Court necessarily concluded, the quoted subcontract terms can most reasonably be read to incorporate the prime contract and require adherence to WMATA's directions *only in matters relating to work specifications and performance.*" (Emphasis added.) *Id.*

The language that was relied upon by Norair in unsuccessfully arguing that various clauses of the subcontract incorporated by reference the terms of the prime contract was as follows:

> "in accordance with the terms and provisions of said Contract including all Contract

> Documents forming a part of such Contract, and which are now made a part of the Subcontract Agreement insofar as they apply, and are hereby incorporated by reference. . .
>
> "[t]he Subcontractor and his Subcontractor will be and are bound by any and all parts of said documents insofar as they relate in any way or in any part to the work undertaken herein. . ." *Id.* at 234.

Although the decisions cited herein are interpretations of contracts where a prime contract is incorporated by reference into a subcontract, the holdings also apply to the instant case where a prime contract and subcontract are incorporated by reference into a sub-subcontract. The Fourth Circuit also supports the law in the District of Columbia.[3] In *United States For the Use of B's Company* v. *Cleveland Electric Company of South Carolina*, 373 F.2d 585 (4th Cir. 1967), the Fourth Circuit held:

> "The basic error of the prime contractor in this appeal is his contention that the subcontractor is bound in every way and exactly as the prime contractor is bound by the terms of the prime contract. It is true that the terms of the subcontract stated that the subcontractor was bound by the terms of the prime contract and that it assumed the prime contractor's obligations to the Government insofar as applicable to the work performed by the subcontractor, but this identical language has been held, and we think properly, not to require the subcontractor to pursue the

[3]The petitioner contends tht the instant action is also in conflict with *United States For the Use of B's Company* v. *Cleveland Electric Company of South Carolina*, 373 F.2d 585 (4th Cir. 1967).

> administrative remedies. . .*We think that that agreement was intended to cover the quality and manner of performance of the subcontractor,* not the rights and remedies between the prime contractor and the subcontractor. Thus, the obligation to pursue and to exhaust the administrative remedies provided in the disputes article of the prime contract is the prime contractor's obligation alone, *and any conflict between these divergent remedies constitues a business risk which the parties incur by virtue of their different contracts."* (Emphasis added.) *Id.* at 588.

The Supreme Court of Virginia has also held that the prime/owner contract is only incorporated into the sub/prime contract for the purpose of indicating the nature of the work and materials required. In *VNB Mortgage Corporation v. Lone Star Industries, Inc., 215 Va. 366, 209 S.E.2d 909 (Va. 1974), an action involving the issue of whether or not subcontractors had agreed to waive the mechanic's liens right through incorporation by reference, the Court quoted the pertinent contract provision:*

> *" '(1) Subcontractor agrees to furnish all material and perform all work as follows: . . . in accordance with the drawings and specifications prepared by [the architect] . . . for said project, and in accordance with all the terms, general conditions and special conditions, and in accordance with drawings and specifications described . . . all of which are a part of the Agreement between Contractor and Owner and all of which are hereby made part and parcel of this Agreement herein, and shall be read as a part hereof, and to which Subcontractor acknowledges having read and*

> *approved the same, and agrees to be bound thereby as to the work and materials herein and therein called for.' (Emphasis added.)" Id.* at 912-913.

and held as follows:

> "Thus, by paragraph (1) the subcontractor was put on notice of the general contract between the Owners and Spring, and of the plans and specifications for the projects, but he accepted them only as to the nature of the work and materials required of him. The incorporation of documents by reference in paragraph (1) is, therefore, restricted to that purpose only. *Guerini Stone Co.* v. *Carlin*, 240 U.S. 264, 36 S.Ct. 300, 60 L.Ed. 636 (1916), *Nelson and Co.* v. *Development Corp.*, 207 Va. 386, 391, 150 S.E.2d 142, 146 (1966)." *Id.* at 913.

The Fifth Circuit has also held that incorporation by reference from a prime/owner contract into a sub/prime contract is only for the manner of the performance of the work. *Edward E. Morgan Co.* v. *United States*, 230 F.2d 896 (5th Cir. 1956). In *United States* v. *Fryd Construction Corporation*, 423 F.2d 980 (5th Cir. 1970), a Miller Act case wherein a subcontractor claimed extra costs incurred during construction, the Court held:

> *"We hold, therefore, as we did in Caldwell, that a general incorporation by reference, of the terms of the principal contract, refers only to 'the quality and manner of the subcontractor's work, not the rights and remedies he may have against the prime contractor.'* 407 F.2d at 23. See also, to the same effect, Warrior Constructor, Inc. v. Harders, Inc., 5th Cir. 1967, 387 F.2d 727; United States

> for the use of B's Company v. Cleveland Electric Co. of South Carolina, 4 Cir. 1967, 373 F.2d 585; Fanderlik-Locke Co. v. United States for the use of M.B. Morgan, 10 Cir. 1960, 285 F.2d 939, 942-943; Beacon Construction Co. of Mass. v. Prepakt Co., 1 Cir. 1967, 375 F.2d 977, 980-981." *Id.* at 983.

Thus, the holdings are in agreement that the incorporation in the Williams/Binkley contract only refers to the quality and manner of Williams' work. Binkley received the benefit of Williams' contract price. Binkley could have very well protected itself by including certain additional contract provisions in the Williams/Binkley contract which would have, of course, resulted in a higher price for the work contracted. Binkley took a "business risk" and it is now liable for Williams' costs.

2. Was the "extra work" provision in the Williams/Binkley contract waived by the parties?

The United States Court of Appeals for the Fourth Circuit held in part that:

> ". . .The Magistrate further found that Williams' claims for extra work were barred because Williams had not submitted those claims in accordance with the procedure set forth in the Binkley/Williams Agreement.
>
> "Upon consideration of the records, briefs and oral arguments, we perceive no error in either the factual findings of the Magistrate or her conclusions of law based thereon. . ." (A-4).

Paragraph 4 of the Williams/Binkley contract states:

> "4. No alterations or changes shall be made in the work described herein except upon written order of Binkley; and when so made

> the value of the work and materials added or omitted shall be computed and determined by the Erector [Williams] and Binkley and such determined value shall be added to or deducted from the contract price by Change Order issued by Binkley. No claims for additional compensation shall be considered or paid unless made in compliance with this paragraph and authorized in writing before the work is started. Additional charges will be paid in accordance with the terms of Paragraph 3 of this Agreement." (C.A. App. 142-143).

Williams contends that the reliance upon the above contract clause as a means of denying Williams the costs and damages incurred on this project is erroneous.

In reference to the extras (C.A. App. 214, 215, 216, 227, and 230) and slow pay for said extras, Mr. Conover of Williams testified on cross-examination that Binkley did not approve the extras prior to the work being performed. (Tr. 122). The undisputed testimony was:

> "A. We had those billed extras, in fact, at that time as I recall, we had, it seems to me, we had five extras on the treatment plant project.
>
> Q. Three had been paid?
>
> A. Two or three of them were not paid in a timely manner.
>
> Q. But they have been paid?
>
> A. They certainly have been paid by now, yes.
>
> Q. And two have not been paid?
>
> A. Two have not been paid even at this date. But the first three that were paid, have not been paid in a timely manner. By timely, I would say 20 days, 30 days, or 60 days, or any such timely time as that.

Q. *Did Binkley approve these extras?*

A. *No, he didn't.*

Q. How do you know it is within their power to pay these extras?

A. We did the work for Binkley, so it is for them to pay us in timely fashion." (Emphasis added.) (Tr. 122, C.A. App. 109).

The evidence clearly shows that Williams performed "extra work" and then invoiced Binkley for the same. (C.A. App. 214, 215, 216, 277, and 230; Tr. 122). *The parties did not perform "extra work" in accordance with the contract.* Binkley did not provide written orders to Williams for the "extra work." (Tr. 122). Binkley only issued *one* Change Order or written order to the contract. (See C.A. App. 146-147). Williams invoiced Binkley for the actual costs Williams incurred after the work was completed and *Binkley paid the same.* (Tr. 122, C.A. App. 109). The parties have clearly waived the above "extra work" provision of the contract by their actions and course of dealing. Binkley did not dispute or challenge that the parties waived the extra work provision at the trial level no can it dispute or challenge the same now.[4]

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[4]In fact, Binkley advised Williams not to submit its claims because of problems Binkley was having with the prime contractor. The undisputed testimony was as follows:

"Q. Did Binkley ever suggest or request you to defer submitting any claims on the treatment plant project?

A. . . . I had a conversation, a phone conversation with Tom Hadley about the claim and at that time it was suggested that since Binkley was owned a lot of money from the general contractor, and there was a serious question about punchlist work, some of it highly debatable, that they didn't want to do anything to antagonize the general contractor and just to wait and not do anything about the claims until they could get their money resolved." (C.A. App. 105)

In *Shapiro, Inc.* v. *Bimblich*, 101 A.2d 890, 892 (D.C. Mun. App. 1954), the Municipal Court of Appeals of the District of Columbia held:

> "Shapiro also contends that no recovery should have been allowed to Bimblich for extras because the contract provided that 'No statements for extras will be honored * * * unless these statements are in accordance with written orders signed by the General Contractor and the Subcontractor. . .Such a provision in a written contract does not prevent the parties from making separate parol agreements regarding extras. (Citations omitted.)"

Williams contends in accordance with the law of the District of Columbia that the parties were able to waive the extra work provision in their contract and, in fact, did do so. The Fourth Circuit has held in *Schmulbach* v. *Caldwell*, 196 F. 16 (4th Cir. 1912) wherein the contract provided in part:

> "No alterations shall be made in the work shown or described by the drawings or specifications except upon a written order of the architects or owner . . ." *Id.* at 18.

that the parties waived the provision of the contract by their course of conduct. The Court held:

> ". . .In regard to the other charges he has found that each alteration was necessary—in many of them it would have been impracticable for the architects to have given a written order. There is ample ground upon which to base the conclusion that in regard to them there was, by course of conduct, a waiver of the terms of the contract. . . One may not by a course of

> conduct induce another to act upon the understanding that there is a waiver of strict performance, thereby obtain an advantage or benefit and repudiate liability for fair compensation by invoking the terms of the contract. *To do so is inequitable. Whatever difficulties a court of law may find in dealing with such cases by reason of technical rule of pleading disappear in a court of equity where it is apparent that one party has acquired a benefit from the work done and material furnished by the other, under such circumstances as to make it inequitable to withhold compensation. It is manifest that the extras for which no written order was given come within this principle.* (Emphasis added.) *Id.* at 23-24

The Fourth Circuit has also held in *Ross Engineering Co. v. Pace*, 153 F.2d 35, 49 (4th Cir. 1946) that the requirement for a written order was waived by the parties' action. The Court stated:

> "The subcontractor provided that no alterations should be made in the work covered by the contract except upon the written order of Ross stating the amount to be added to or deducted from the contract price. . .
>
> ". . .[W]e do not think that they can be invoked to defeat recovery upon the disputed items in this case. From the beginning of the contract work the parties to the subcontract ignored the provisions as to written orders and proceeded with the work with little or no regard for them. . .

> "We think that under these circumstances, there was substantial ground for the position of M.B.S. that the contract provisions in regard to written orders were waived by Ross by its conduct throughout the period covered by the construction of the camp. . ." *Id.* at 49-50.

The facts concerning the waiver of the "extra work" provision in the Williams/Binkley contract are undisputed, unchallenged and uncontroverted. Accordingly, the parties through their conduct and course of dealing clearing waived the contract provision that required any "extra work" to be approved in writing by Binkley prior to the commencement of the work.

3. Does the "extra work" provision in the Williams/Binkley contract prevent recovery for damages incurred as a result of the breach by Binkley?

Williams contends that it is also able to recover its cost and damages because the "extra work" provision does not preclude recovery of the same. Williams is not seeking an adjustment for extra work, that is , the work that Williams was not obligated to do under the subcontract when signed. Williams' claim is for the additional costs incurred while performing the work it originally contracted to perform. In *John A. Johnson & Sons, Inc.* v. *United States*, 153 F.2d 534, 542 (4th Cir. 1946), the Fourth Circuit held that failure to comply with an extra work clause did not bar recovery when the work was not extra work. The court permitted a subcontractor to recover the expenses it incurred in doing work necessitated by the wrongful acts of the contractor. Referring to the extra work clause, the Court stated in part as follows:

> "[T]he provisions of this Article have no. . .application to the present controversy because they clearly appear to relate to extra work, that is, work not within the express or reasonable implied scope of the specifications agreed upon at the time that the two contracts were made." (Emphasis added.) *Id.* at 542.

Expenses caused by delay were held not to be covered by an extra work clause in *W. Wright, Inc.* v. *Korshoj Corp.*, 197 Neb. 692, 250 N.W. 2d 894, 899 (Neb. 1977). The Court stated that:

> "[W]e do not believe that [the extra work clause] is relevant to Wright's claim, which is for *expenses* caused by delay, not for reimbursement for *extra or additional work*. The clause quoted above refers to extra or additional work performed by Wright, work which Wright was not obligated to do under the subcontract does not resolve the issue in the case. [Citations omitted.]" *Id.* at 899.

Similarly, expenses involved in repairing damaged work are not governed by an extra work clause.[5] In *Collins* v. *Post* 227 Or. 299, 362 P.2d 325, 327 (Ore. 1961), the Court read an extra work clause as applying only to additional work or changes outside the scope of the original contract. The Court permitted a claim for damages expenses, noting that "it did not involve work arising outside the contract as originally drawn or subsequently amended . . . It, therefore, require not written instructions from the contractor under [the extra work clause]." *Id.*

---

[5]Mr. Conover of Williams also explained the terms "extra" and "claim". His expert testimony as to the terms was undisputed that "there is a very definite difference between an extra and a claim." (C.A. App. 104).

An extra work clause was given the same definition in *Artcraft Cabinet, Inc.* v. *Watajo, Inc.*, 540 S.W. 2d 918, 923 (App. Mo. 1976). In *Aircraft*, a subcontractor was permitted to recover the expenses it incurred in correcting the contractor's error, even though the extra work clause was not complied with. The Court held that the clause was inapplicable because the work was not extra. In rejecting the extra work clause argument the Court stated that the correction work "was not extra work within the meaning of paragraph XIII, but additional labor used in the performance of the contract as written and agreed, but hindered by the default" of the contractor's architect. *Id.*

4. Did Binkley breach its contract with Williams by failing to properly coordinate and administer its contract?

Williams contends that the finding that Binkley did not breach its contract and did not fail to properly coordinate and administer its contract is erroneous.

Binkley breached its contract by failing to properly coordinate the work, which caused WIlliams increased costs for performing its work. As Williston has stated:

> "The underlying principle is that there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing." 5 S. WIlliston, Contracts, 670, at 159 (3rd ed. 1961).

This well-recognized principle, as applied in construction contracts, implied an obligation on Binkley's part to keep the work of other trades in a proper state of forwardness. As the Court stated in *Studer v. Rasmussen*, 80 Wyo. 465, 344 P. 2d 990, 996 (Wyo. 1959):

> "The plaintiff claims that this implied contract was that the defendant must provide a building in a proper state of forwardness so that the plaintiff's work could be installed within the time limit in its contracts with defendant ... The rule is undoubted in this case that an *implied contract arose on the part of the defendant to keep the work on the building, whether done by itself or other contractors, in such a state of forwardness as would enable the plaintiff to complete its contract within the time limited* . . ." (Emphasis added.)

According to the law of the District of Columbia, a contractor may be held responsible for a subcontractor's delay, where the delay was caused by the acts of another subcontractor. In *Melwin Construction Company, Inc.* v. *Stonewall Construction Company,* 113 A.2d 108 (D.C. Mun. App. 1955), the defendant prime contractor subcontracted with the plaintiff for the construction of roadwork and culverts, and with a plumbing subcontractor for digging ditches for water lines. The plumber's failure to perform resulted in a stoppage of the plaintiff's performance. *Id.* at 110. The plaintiff was thus delayed, and had to perform its work under winter rather than summer conditions, *Id.* The Court found that the delay was the responsibility of the defendant, stating:

> "As to the question of bad weather, we find ample evidence in the record to justify the conclusion that although the project was undertaken during the late summer of 1953 and undoubtedly could have been completed prior to any severe wintry weather, the resulting delay caused by appellant [contractor] *or those for whom appellant [contractor] was responsible,* necessitated a prolongation of the project not foreseen by appellee in its original estimate of time needed and therefore encumbered the construction

> work with unanticipated winter conditions. *For this, appellant bears the loss,* if any." (Emphasis added.) *Id.*

The Court's reasoning in *Melwin Construction Company, supra,* clearly controls the instant case. Binkley, as a first-tier subcontractor, stands in the same position to its second-tier subcontractors as does a contractor to its first-tier subcontractors. Binkley's relationship to its subcontractors is the same as the defendant's relationship to its subcontractors in *Melwin, supra.* Binkley's responsibilities to its subcontractors are also the same.

Binkley breached its contract not only by failing to provide for the prompt performance (C.A. App. 62, 73, 78) but also by failing to properly administer the contract with respect to the problems Williams encountered. (C.A. App. 62, 73, 78). Williams requested that Binkley ship the siding materials in partial shipments (C.A. App. 49-50) after Binkley had breached its contract by not providing Williams a ready site. Binkley failed to honor this request and instead shipped certain defective materials to the job site. (C.A. App. 50, 91-93). Thereafter, the evidence was undisputed that Binkley failed to properly administer its contract and failed to stand up for Williams' rights when requested by Williams. (C.A. App. 62, 73, 77-78).

Williams' project manager from the commencement of the project until September, 1978, Mr. Amason, testified that: "Mr. Hadley [Binkley] was being stretched quite thin, so it was more and more difficult to get an immediate response from Binkley." (C.A. App. 63). As the project progressed, Binkley's attitude shifted from that of resolving problems to one of moving the crew to wherever there was work and deferring resolution of problems. (C.A. App. 62). Mr. Amason testified that Binkley became less responsive as the project progressed. (Tr. 55).

Another project manager for Williams, Mr. Allen, testified that he had "trouble in communicating" with

Binkley and that it would take several days for Binkley to return telephone calls. (C.A. App. 73). Mr. Allen further testified on cross-examination as follows:

> "Q. When you were finally able to make connections with Mr. Hadley on various problems as they arose, he was then responsive to do what he could to resolve the problem?
>
> A. He was in some ways sympathetic, but when we finally met at the trailer, a lot of times *I felt like I was the ping pong ball in the middle of a match and he was being swayed by Remsco* [the prime contractor] and not really defending our problems or adequately taking our point of view.
>
> . . .
>
> *". . . I didn't feel like he was standing up for me."* (Emphasis added.) (C.A. App. 77-78).

Binkley failed to "do all that which is reasonable necessary in order to enable the contracting party to so perform." *Edward E. Gillin Co. v. John H. Parker Co.*, 41 N.D. 587, 171 N.W. 616, 617 (1919). As the District of Columbia Court of Appeals has held, "there is no doubt that hindrance or prevention of performance constitutes a breach of contract . . ." *Minmar Builders, Inc.* v. *Beltway Excavators, Inc.*, 246 A.2d 784 (App. D.C. 1968). Binkley's action constitute a breach of contract. The result of the breach of contract by Binkley was that Williams' cost of performing the work under its contract increased significally.

5. Did Binkley breach its contract with Williams by not providing a ready site for the work on June 26, 1978?

Williams contends that the finding that Brinkley did not breach its contract by failing to provide a ready site for the work on June 26, 1978, is erroneous.

Binkley breached its contract with Williams by failing

to provide a work site at the time agreed upon. (C.A. App. 48, 151; Tr. 172).

Binkley's contract with Williams states: "work to commence approximately the week of June 26, 1978." (C.A. App. 140). Binkley unconditionally agreed to provide a work site the week of June 26, 1978. However, the work site was in unsuitable condition for Williams to perform at that time (C.A. App. 48, 151; Tr. 172), and Williams was not able to start work until the beginning to middle of August, 1978. (Tr. 172, Pl. ex. 42). In order for Williams to perform the metal siding work, the structural steel frame was required to be completed. (C.A. App. 48). Williams advised Binkley that the structural steel work was not complete on June 30, 1978. (C.A. App. 151).

The testimony was undisputed at trial that Williams repeatedly advised Binkley that its failure to prepare the site and to take other actions was causing delays and interruptions that would affect Williams' performance. (C.A. App. 48-49, 54-56, 65, 72-77, 104, 132-133). Williams even advised Binkley on June 30, 1978 in writing prior to the commencement of the siding erection that:

> "To start with the building its not complete . . .
>
> "This could impact upon our operation in that it could require extra trips for which we have not planned, frustrate proper storage and protection of materials and possibly hinder erection in the area already up.
>
> "Other observations concerned incomplete miscellaneous metal work around columns and misalignment of the sill angle along the entire length of the south face of the erected portion of the building." (App. 151).

Further, the evidence was undisputed that *the project "should have been completed within 45 days."* (C.A. App. 163).

Thus, the evidence at trial was that Binkley breached the contract by failing to comply with its express

provisions. If Binkley now wishes to justify its actions, the burden is on Binkley to establish an excuse for nonperformance. "If there was some justification for defendant's breach, the burden of establishing it rested upon defendant." *Malcolm MacDowell & Associates, Inc. v. Ecorse-Lincoln Park Bank*, 325 Mich. 591, 38 N.W. 2d 921, 924 (Mich. 1949). See also *Sale v. State Highway and Public Works Commission*, 242 N.C. 612, 89 S.E.2d 290, 298 (N.C. 1955); 17 C.J.S. Contracts, Sec. 590, p. 1231; Williston on Contracts, Rev. Ed., Sec. 1979. Binkley failed at trial to show any justification for not providing a site for Williams in accordance with its contract and must now be liable for Williams damages.

The Supreme Court held in *Guerini Stone Company v. P.J. Carlin Construction Company*, 248 U.S. 334, 340, 39 S. Ct. 102, 104, 63 L.Ed. 275 (1919), that the failure to furnish a suitable construction site constitutes breach of contract, even when the contract does not expressly address the issue. The Court stated:

> *"It is sufficiently obvious that a contract for the construction of a building, even in the absence of an express stipulation upon the subject, implies as an essential condition that a site shall be furnished upon which the structure may be erecting* . . . the facts of the case, imported an agreement by defendant to furnish the foundation in such manner that plaintiff might build upon it without delay, and was inconsistent with an implication that the parties intended that delays attributable to the action of the owner should leave plaintiff remediless, and *defendant's obligation* to furnish a suitable foundation was not dependent on whether it was at fault, or whether the delay was attributable to a stoppage of work by the owner in the exercise of a right conferred upon it by a provision of the principal contract which was not brought

into the subcontract." (Emphasis added.) *Id.* at 340-341.

The United States Court of Appeals for the District of Columbia held in *Merando v. Mathy,* 152 F.2d 21 (D.C. Cir. 1945) that a contractor breached its contract with a subcontractor by failing to prepare the work site for the subcontractor's craftsmen. The court found that the contractor was obligated to do cutting and patching work and to erect scoffolding that was necessary to "open up" the building, in order to facilitiate the plumbing subcontractor's work. The court affirmed that a breach of contract occurred, on the ground that "the defendant failed to perform satisfactorily his obligation to clear the way for the [subcontrctor's] craftsmen. . ." *Id.*

The Fourth Circuit has followed this rule and has held that a contractor may be held liable for breaching a contract with its subcontractor, even though the breach was attributable to actions of the owner. *John A. Johnson & Sons v. United Staes,* 153 F.2d 534, 541 (4th Cir. 1946). In *John A. Johnson,* which involved a subcontractor that assumed all the obligations that the prime contractor assumed towards the Government, the Court held that a breach of contract by the Government to the prime contractor did not excuse that same breach of contract by the prime contractor to the subcontractor. The Court stated:

> "Whatever may be the Government's defense to the breach of performance on the part of the Project Engineer, we find, for the purpose of the present suit, *that such breach did occur and that the contractor cannot successfully avoid liability to the subcontractor in the face of this breach, any more than he can avoid liability because of his own similar breach."* (Emphasis added.) *Id.*

This rule was applied in *Great Lakes Construction Company v. Republic Creosoting Co.,* 139 F.2d 446, 464

(8th Cir. 1943), to a prime contractor who failed to furnish a proper work site to a flooring subcontractor. After quoting *Guerini Stone, supra,* the Court stated, "it is equally obvious that a contract to construct the flooring in a building implies timely provision of the situs for its location." *Id.* at 464. The Court held that the contractor's failure to provide a site was a breach of contract.

Similarly,a contractor was found to have breached its duty to a subcontractor by failing to have missile sites ready for pouring in *Concrete Specialties v. H.C. Smith Construction Co.,* 423 F.2d 670, 672 (10th Cir. 1970). Noting that "each of the parties to a contract owes the other a duty of good faith performance," The Court held that the failure to provide a proper site is a breach of this duty of cooperation. *Id.*

Thus, it is obvious that in the instant case, Binkley's failure to provide a work site in a sufficient state of readiness was a breach of its contract.

6. Did Binkley breach its contract with Williams by failing to adjust the shipping sequence after Binkley had breached its contract by failing to provide a ready site?

Williams contends that the holding denying Williams recovery of its damages caused by Binkley's failures to adjust the shipping sequence of materials is erroneous.

Mr. George S. Trimble, an expert witness, employed by the H.H. Robertson Company, testified that the trade custom and industry standard is to adjust the delivery schedule when another trade falls behind schedule. (C.A. App. 42-43). Mr. Trimble testified when questioned about the problem of coordination:

> "A. The Robertson Company gets in touch with the general contractor and talks it out.
>
> Q. Could you explain a typical problem in the industry?

A. Well, if another supplier, say in structual steel fabricator, doesn't make the time in putting the frame up for a building in his projected schedule, and the job falls behind scheduling, then there has to be an adjustment to the delivery promise of the job site.

MAGISTRATE MUNSELL: And you make that as the subcontractor between the prime and sub-subcontractor, you make those?

THE WITNESS: Yes.

MAGISTRATE MUNSELL: That is a part of your contractural definition of how you work?

THE WITNESS: It is not contractual, we work in the best interests of our own flow of material . . ." (C.A. App. 43).

Mr. Trimble further testified that the trade custom or industry standard was that the supplier of metal siding would attempt to hold up delivery where the field erector (Williams) advises that the field work is behind schedule. (C.A. App. 44, Tr. 31). Mr. Trimble's testimony was undisputed.

Williams' project manager for the project, Mr. Warren Amason (C.A. App. 47), testified that he initially visited the site once a week before work commenced (C.A. App. 47) and that the work of other trades was "sporadic." (C.A. App. 47). Mr. Amason also advised Binkley in a letter dated June 30, 1978, long before the work commenced, that:

"To start with the building is not complete . . .

"This could impact upon our operation in that it could require extra trips for which we have not planned, *frustrate proper storage and protection of materials* and possibly hinder erection in the area already up." (Emphasis added.) (C.A. App. 151).

Mr. Amason further testified that the structural steel for a building should be 100 percent complete before the

metal siding erector commences installation of the siding. (C.A. App. 48). Mr. Amason testified that:

> "... The building was by no means complete at that time.
>
> There were other factors on the job that I pointed out here, primarily that the job was very restricted as far as access and storate, etc. . .
>
> Q ... Did you discuss the sequence in order of shipments with Binkley's respresentatives?
>
> A Yes, we did, consistent with the fact that the access and working conditions were so limited.
>
> . . .
>
> Q What was the nature of that conversation?
>
> A Just the fact that it would have been easier to bring the stuff in on a phased delivery schedule to avoid the potential for damages to the materials that had to be stored adjacent to the job, since there were not provisions for storage. There were a great many trades working in there at exactly the same time in a limited area. It was never agreed by Binkley that it could be done, *but the need was stressed.*
>
> Q What was Binkley's representative's response?
>
> A That they would see what they could do..." (Emphasis added.) (C.A. App. 48-50).

As Williams advised Binkley prior to the commencement of its erection work (C.A. App. 48-50, 151), Williams encountered numerous storage problems (Tr. 60-61, App. 70-71) during the construction

period which extended over a one-year period instead of the forty-five day period anticipated. The storage problems that resulted from Binkley's breaches increased Williams' cost. (Tr. 61-62).

Since Binkley refused to adjust the shipping sequence (Pl. ex. 42) as requested by Williams after Binkley had breached its contract by failing to provide a ready site, Binkley is responsible for Williams' increased cost.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

PETER PAUL MITRANO, ESQ.
Suite 413
510 King Street
Alexandria, Virginia 22314
(703) 549-2000
Counsel for Petitioner

May 3, 1982

Appendix

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 81-1314

Williams Enterprises, Inc.,

Appellant,

versus

The Binkley Company,

Appellee.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Butzner for a panel consisting of Judge Butzner, Judge Field, and Judge Sprouse.

For the Court,

/s/William K. Slate, II

CLERK

FILED

FEB. 2, 1982

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1314

WILLIAMS ENTERPRISES, INC.,

Appellant,

versus

THE BINKLEY COMPANY,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria, Elsie L. Munsell, Magistrate.

Argued: November 4, 1981 Decided: December 18, 1981

Before BUTZNER, Circuit Judge; FIELD, Senior Circuit Judge; and SPROUSE, Circuit Judge.

Peter Paul Mitrano for Appellant; Terrence Ney (Thomas F. Farrell, II, Boothe, Prichard & Dudley on brief) for Appellee.

PER CURIAM:

Williams Enterprises, Inc. (Williams) filed an action against The Binkley Company (Binkley) seeking

damages for the alleged breach of a contract between the parties. By consent of the parties, the case was tried by a United States Magistrate who entered judgment in favor of Williams on one of its claims, but found in favor of Binkley on the remaining claims. Contending that it was entitled to previal on all of its claims, Williams has appealed.

This dispute arose out of the construction of an experimental waste water treatment plant in the District of Columbia. Binkley entered into a subcontract with Remsco Associates (Remsco), the prime contractor, to provide and install metal siding on the project. In turn, Binkley subcontracted with Williams to furnish all labor, equipment and services that Binkley was required to provide pursuant to its contract with Remsco. Paragraph II of the Agreement specifically provided that Williams assumed toward Binkley all of the obligations and responsibilities that Binkley assumed toward Remsco under the base contract as well as the contract between Remsco and the Owner. Additionally, the Agreement incorporated all portions of the base contract dealing with the manner in which the work was to be performed. Williams alleged that Binkley failed to perform its obligations under the contract in the following respects: (1) failed to provide a ready site for the work; (2) failed to coordinate and administer the work of other trades to permit a consistent work schedule; (3) failed to coordinate the delivery of materials; (4) failed to provide necessary shop drawings; and (5) improperly rejected Williams' claims for extra work.

Based upon the evidence presented, the Magistrate found that Binkley had no control over the work schedule or the coordination of material deliveries. She also found that Binkley was not responsible for any of the delays and, in any eveny, concluded that Williams'

delay claims were barred by the "no damages for delay" clause in the Remsco/Binkley contract which was incorporated by reference in the Binkley/Williams Agreement. The Magistrate further found that Williams' claims for extra work were barred because Williams had not submitted those claims in accordance with the procedure set forth in the Binkley/Williams Agreement.

Upon consideration of the records, briefs and oral arguments, we perceive no error in either the factual findings of the Magistrate of her conclusions of law based thereon. Accordingly, the judgment of the district court is affirmed.

AFFIRMED

BEFORE A UNITED STATES MAGISTRATE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria, Division

WILLIAMS ENTERPRISES, INC., *Plaintiff,*	)	**CIVIL ACTION NO. 80-0719-A**
v.	)	
THE BINKLEY COMPANY, *Defendant.*	)	

MEMORANDUM OPINION

This matter was heard for trial before the Magistrate by consent of the parties pursuant to 28 USC §636(c)(1) on January 26, 1981. The Magistrate has heard and considered the evidence presented, and has reviewed and considered the exhibits submitted by the parties.

This action arises from contractual relationships between the parties. The agreements in question were made for construction services at the site of the experimental Estuary Water Treatment Plant at Washington, D.C., and Noland Central Office and Warehouse at Chesapeake, Virginia.

The plaintiff is seeking to recover its:

1. Contract retention and compensation for certain extra work.
2. Reasonable attorney's fees for the collection of the same on both projects.
3. Damages for breach of contract on the treatment plant project.

The defendant asserts a counterclaim for costs to complete and correct work.

Plaintiff, Williams Enterprises, Inc., is a corporation duly incorporated under the laws of the District of Columbia, with its principal place of business at 2931 Gallows Road, Merrifield, Virginia 22116.

Defendant the Binkley Company ("Binkley") is a metal fabricator and manufacturer of commercial building siding. It is neither incorporated nor does it have its principal place of business in Virginia.

1. On September 13, 1977, Remsco Associates and others ("Remsco") entered into a prime contract with the Corps of Engineers to construct an experimental estuary water treatment plant (the "Water Treatment Plant') in Washington, D.C. (Defendant's Exhibit No. 3).

2. On November 8, 1977, defendant Binkley entered into a subcontract with Resmco to furnish all labor and materials to do Section 7C of the plans and specifications for the Water Treatment Plant job. (Defendant's Exhibit No. 2).

3. On or about June 8, 1978, plaintiff and defendant entered into a contract in writing (Plaintiff's Exhibit 1) whereby plaintiff agreed to furnish all labor, equipment and services required for the installation of certain metal siding and related accessories for the completion of the Experimental Estuary Water Treatment Plant located in Washington, D.C., and defendant agreed to pay plaintiff a base price of thirty-nine thousand dollars ($39,000.00) for such work.

4. On or about November 17, 1978, plaintiff and defendant entered into a contract in writing (Plaintiff's Exhibit 32) whereby plaintiff agreed to furnish all labor, equipment and services required for the installation of certain metal siding and related accessories for the completion of hte Noland Central office and Warehouse, Chesapeake, Virginia, and defendant agreed to pay plaintiff a base price of forty-nine thousand three hundred seven dollars ($49,307.00).

BREACH OF CONTRACT

The most significant of the claims presented by plaintiff is that for compensatory damages for breach of the treatment plant project contract.

Plaintiff alleges that Binkley failed to perform its obligations under the contract in good faith, in that Binkley:

1. Failed to provide a ready site for the work on June 26, 1978.
2. Failed to coordinate and administer the work of other trades so as to make plaintiff's work move ahead on schedule.
3. Failed to co-ordinate the delivery of materials with plaintiff, thereby engendering loss to plaintiff, because of storage problems, loss of material, and extra cleaning of materials.
4. Failed to provide necessary shop drawings to enable accurate placement of fittings for exterior wall penetrations.

Defendant denies any such failure, and asserts that these claims were not timely presented under the contract terms and are therefore barred.

The Court finds that the Defendant did not breach its contract in these respects.

1. The contract states in its introductory paragraphs that work is to commence "approximately June 26, 1978,"; the evidence is that Williams employees were at the site preparing for erection in June and July, and work began in earnest in early August. This delay in commencing to place material on the structure is not shown by the evidence to be attributable to Binkkley, or unreasonable in the circumstances, or even in violation of an express term of the contract. Time of execution is nowhere addressed in the body of the contract.

2. There is no showing that Binkley had control over other trades, or any obligation to supervise or control other trades under the terms of contract with Williams, or with Remsco. Article VIII of the Remsco/Binkley contract (Defendant's Exhibit 2) deals with delay, providing for extensions of time for duly claimed delays, but no additional compensation.

3. The delivery of materials is expressly controlled by the terms of the Williams/Binkley contract, paragraph 8, page 5. Williams having made no request for a specific shipping sequence as agreed, will not now be heard to complain of Binkley's schedule.

Storage, cleaning, and protection of materials are expressly Williams' duty under the contract - paragraph (1)(a), page 2.

4. The drawings supplied to Williams were sufficiently accurate for the purpose for which they were intended. Part of Williams' duty under the contract was to supervise the erection of the material, including taking those steps in the field to reduce drawings to on-site activity.

While the Court does not read all of the administrative details of the Remsco contract into the Williams/Binkley contract, paragraph 4 of that contract (Williams/Binkley) clearly contemplates written claims for extra work, negotiated and priced *before* the work was done. Insofar as the plaintiff's claims are put forward as extra work, where plaintiff failed to comply with this provision, the claims are improperly brought.

RETENTION AND OFFSETS

The parties acknowledge that certain funds under the two contracts were held as "retained" funds. Binkley asserts certain claims as offsets to payment of the retained funds. The Court finds that the asserted offsets are proper, and supported by the evidence, and calculates the money due as follows:

ESTUARY WATER TREATMENT PLANT[1]

Contract price (as amended)	$ 39,550.00
Payments to December 15, 1980	$-35,132.26
retained	$ 4,417.74
Defendants charge for materials purchases by plaintiff: #6426	$ -2,017.81
retained (after offset #1)	$ 2,399.93
Defendants charge for correction and completion of work	$ '1,960.00
retained (after offset #2)	$ 439.93

[1](Defendants Exhibits 11 and 4 are incorrect because calculated from invoice amount, not contract amount.

NOLAND CENTRAL OFFICE, CHESAPEAKE, VA.

Contract price as amended	$50,365.36
Payments made to December 15, 1980	$44,818.21
retained	$ 5,547.15
Less backcharges on Gibson equipment	$ 900.00
retained	$ 4,647.15
Total retained both contracts	$ 4,647.15
	$ 439.93
	$ 5,087.08
Paid to plaintiff in January 1981	$ 3,943.59
retained	$1,143.49

EXTRA WORK CLAIMS

Williams forwarded claims to Binkley for extra work in the amounts of $451.12 and $1,353.36 (a total of $1,804.48) which Binkley has forwarded to Remsco for payment. Remsco has not yet decided to allow or disallow these claims.

Williams asserts that this amounts is now payable. The Court agrees with that assertion. Binkley appears to concede that the plaintiff is entitled to its contract payments, less set-off. The evidence reflects that the job is now complete. Insofar as the claim for extra work becomes a part of the contract price, it is now due between Binkley and Williams.

Attorneys fees are requested by the plaintiff for this action, on the basis that the Court could find callous disregard of contractual obligations. The Court does not so find, and the request for attorney's fees is denied.

The Court finds that the plaintiff is entitled to judgment in this case in the amount of $1,143.49 plus $1,804.48, or $2,947.97, with interest at the legal rate until paid, and the costs of its actions.

ELSIE L. MUNSEL
UNITED STATES MAGISTRATE

Alexandria, Virginia
February 18, 1981

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA

CIVIL ACTION FILE NO. 80-0719-A

WILLIAMS ENTERPRISES, INC.,
vs.
THE BINKLEY COMPANY.

JUDGMENT

This action came on for trial before the Court, Honorable Elsie L. Munsell, United States Magistrate, presiding, and the issues having been duty tried and a decision having been duly rendered,

It is Ordered and Adjudged that judgment be entered for the Plaintiff in the amount of $1,143.49 plus $1,804.48, or $2,947.97, with interest at the legal rate until paid, and the costs of its action.

Dated at Alexandria , this 18th day of February ,1981

W. FARLEY POWERS, JR.

Clerk of Court

By: _____

Deputy Clerk

Opposition

Office - Supreme Court, U.S.
FILED
JUN 3 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2031

WILLIAMS ENTERPRISES, *Petitioner*,

v.

THE BINKLEY CO., *Respondent*.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

TERRENCE NEY

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4103 Chain Bridge Road
Fairfax, Virginia 22030
(703) 273-4600
Counsel for Respondent

June 2, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Were the trial court and the court of appeals clearly erroneous in finding Williams's delay claims barred by the "no damages for delay" clause?

2. Were the trial court and the court of appeals clearly erroneous in finding that to the extent Williams's impact claims were for extra work they were barred because Williams did not submit those claims in conformance with the terms of the Agreement?

3. Were the trial court and the court of appeals clearly erroneous in finding Binkley did not breach the Agreement with regard to the date Binkley estimated work may commence on the Project?

4. Were the trial court and the court of appeals clearly erroneous in finding Binkley was not responsible for delays incurred by Williams and the other trades?

5. Were the trial court and the court of appeals clearly erroneous in finding Williams was responsible for additional costs incurred by storage difficulties when the Agreement specifically provided that Williams was responsible for storage and care of the siding?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2031

WILLIAMS ENTERPRISES, *Petitioner*,

v.

THE BINKLEY CO., *Respondent*.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Memorandum Opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division, is contained in the Court of Appeals Joint Appendix (hereinafter C.A. App. ____) at pp. 33-38, and is appended to the Petition (App. A-5-A-11). The *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit was unreported, and appears at pages A-2-A-4 of the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATEMENT

I. Nature Of The Case, Course Of Proceedings And Disposition Below

This construction contract dispute arose out of the construction of an experimental waste water treatment plant in the District of Columbia [1] ("the Project"). The Amended Complaint filed by Williams Enterprises, Inc. ("Williams") sought approximately $80,000.00 in damages from The Binkley Company [2] ("Binkley") for breach of contract and extra work performed. Trial was held before a magistrate of the Eastern District of Virginia ("the trial court") sitting by consent, who considered the testimony of nine witnesses and nearly 60 exhibits, representing over 100 pages of documentation. After careful consideration of that evidence, Williams was awarded $1,804.48 for extra work performed and which was not contested by Binkley.

On December 18, 1981, the court of appeals, after oral argument and the submission of briefs, issued an unpublished, *per curiam* decision affirming the trial court's findings in all respects. Williams's petition for a rehearing *en banc* was denied on February 2, 1982.

II. Statement Of Facts

Binkley, a metal fabricator and manufacturer of commercial building siding, entered into a subcontract to provide and install metal siding at the Project with Remsco Associates and Foster-

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[1] Williams did not appeal the trial court's decision regarding a dispute over construction of an office complex warehouse building in Chesapeake, Virginia. Amended Complaint, Count III. The factual statements and legal argument contained herein relate solely to the Project.

[2] The Binkley Company is not a subsidiary or affiliate of any publicly owned corporation. No publicly owned corporation associated with Binkley has a financial interest in the outcome of this litigation.

Newman Contracting Co., Inc. ("Remsco"), the prime contractor for the Project, on November 8, 1977 ("the Base Contract").[3] In turn, on June 8, 1978, Binkley subcontracted with Williams ("the Agreement"), with Williams to furnish all labor, equipment and services that Binkley was required to provide pursuant to the Base Contract. The Agreement specifically provided that Binkley enjoyed against Williams all of the rights and obligations that Remsco had with respect to Binkley arising from the Base Contract. Additionally, the Agreement incorporated by reference all portions of the Base Contract dealing with the manner in which work was to be performed by Williams. (C.A. App. at 141).

In addition to requiring Williams to furnish labor, and abide by the administrative regulations of the Base Contract, the Agreement required that Williams control and care for the siding after its delivery to the Project, including inspection, storage and cleaning, as well as installation. Finally, if Williams desired a specific shipping sequence for the material, it was required to inform Binkley on or before the date of execution of the Agreement. Otherwise, it was agreed that the siding would be shipped in the manner most convenient to Binkley. (C.A. App. at 144). Williams did not request a specific sequence prior to the established deadline.

In exchange, Binkley agreed to pay Williams $39,000.00 as the base price on an established payout schedule, and to deliver the required materials to the job site. Although the Agreement contemplated that Binkley would inspect the Project from time to time, it was specifically agreed that these inspections would not alter Williams's duties. (C.A. App. at 145). In short, Binkley was to provide material and Williams was charged with

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[3] The owner of the Project was the Corps of Engineers. (C.A. App. at 176).

all other aspects of the construction, including all on-site deviations from the construction schedule and plans and specifications provided by the Corps of Engineers and Remsco.

Williams's employees arrived at the Project and began preparations for installation of materials in late June and July of 1978. The installation of the siding began in August, 1978. (C.A. App. at 36, 151).

Construction initially proceeded slowly due to an apparent lack of coordination of the various trades by Remsco and alterations requested by the Corps of Engineers. (C.A. App. at 66-67). Due to Williams's failure to insure a proper storage area near the Project, materials shipped by Binkley were stored at great distances from the work site, causing damage and loss of material and slowing Williams's completion of its work. (C.A. App. at 71-72).

During the course of construction, Binkley and Williams, in conformance with the Agreement, agreed to five additions to the base price of that Agreement. No other claims for extra compensation were submitted to Binkley during the duration of the Agreement in conformance with its terms.

ARGUMENT

I. The Issues Presented Are Not Of Sufficient Moment To Invoke The Discretionary Jurisdiction Of This Court

Williams's only complaint in the Petition, as it was in the court of appeals, is that the factual findings of the trial court were erroneous. Accordingly, the issues presented are necessarily narrow and affect only the two parties involved in this litigation. The case involves nothing more than a dispute over the performance of a construction sub-contract between Binkley and Williams. A decision on the merits would have no effect other than on the rights of these two companies with regard to one project and one agreement. Indeed, the Petition

does not even presume to present issues that warrant this Court's review.

Williams has not attempted to rely on any of the traditional grounds which this Court has enumerated as a basis to invoke its discretionary jurisdiction. There is no conflict with the decision of another court of appeals; no important state or territorial law has been brought into question; no federal question whatever has been decided, let alone in a manner that conflicts with a prior decision of this Court; nor has the court of appeals so far departed from the accepted and usual course of judicial proceedings that this Court should exercise its power of supervision. *See* Sup. Ct. R. 19. Moreover, on the facts presented the trial court was manifestly correct. In short, there simply is no reason for the Court to hear and decide this case.

II. Two Courts Have Previously Reviewed And Agreed Upon The Factual Findings About Which Williams Complains

As stated, in both the court of appeals and in the Petition, Williams complains that the trial court's factual findings were erroneous. The trial court heard nine witnesses and considered nearly 60 exhibits. The court of appeals after reviewing the record, briefs and oral argument concurred in all respects with the findings of the trial court. When both lower courts concur, this Court has uniformly declined to grant petitions for a writ of certiorari unless a constitutional issue is involved, and it should do so here.

In *Graver Tank Lines* v. *Linde Air Products Co.*, 336 U.S. 271 (1949), Justice Jackson noted:

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

336 U.S. at 275.

The policy underlying the "two-court" rule was reviewed by Justice Stewart in *Bereyni* v. *District Director, Imm. & Nat. Serv.*, 385 U.S. 630, (1967):

> This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force.

385 U.S. at 636.

This rule applies to the factual findings of the trial court which were affirmed by the court of appeals, *viz.*, that Williams's claims are barred by a "no damages for delay" clause in the Agreement, there was no waiver by Binkley of the "extra-work" provision of the Agreement, Binkley was not responsible for the failure to have a ready work site, Binkley did not fail to properly administer the contract, and, finally, that Binkley was not responsible for Williams's storage problems. By operation of the "two-court" rule the Petition should be denied.

III. The Decisions Below Were Clearly Correct

Essentially, Williams is attempting to have this Court reverse the concurrent findings by the lower courts on the ground that their factual findings were erroneous. A closer review of the evidence considered by those courts, however, demonstrates convincingly that the decisions were correct.

For ease in understanding, the provisions of the Agreement which, through general application, bar all of Williams's claims will be presented first. The factual support for the trial court's findings will then be considered, each in turn.

A. Williams's delay claims are barred by the "no damages for delay" clause.

Paragraph 2 of the Agreement provides that:

> [Williams] assumes toward Binkley all of the obligations and responsibilities that Binkley assumes toward [Remsco] and the Owner as set forth in the Base Contract and in the contract between [Remsco] and the Owner, and in the general and special conditions, drawings, specifications and other documents therein and in the Base Contract referred to, insofar as applicable, generally or specifically, to the work performed under this Agreement, and Binkley shall have all rights as to [Williams] which [Remsco] has as to Binkley in the said Base Contract and conditions, etc. therein referred to. These documents are available at all reasonable times for examination of [Williams] at the office of [Remsco], and [Williams] hereby acknowledges the opportunity to examine said documents prior to executing this Agreement.

(C.A. App. at 141).

One of the rights Binkley obtained through Williams's assumption of Binkley's contractual relationship with Remsco was a "no damages for delay" clause contained in Article VIII of the Base Contract:

> Should [Binkley] be obstructed or delayed in the commencement, prosecution or completion of the work because of conditions not attributable to [Binkley], and which by the terms of the general contract [between Remsco and the owner] may be grounds for an extension of time, it shall within twenty-four hours thereafter make claim therefor in writing, and [Remsco] shall award and certify the amount of additional time to be allowed; if any; said time to be the same as shall be allowed by said owner to [Remsco] under the general contract aforesaid, for said delay. [Remsco] shall have the right, at any time, to delay or suspend the commencement or execution of the whole or any part of the work herein contracted to be done, or vary the sequence of performance thereof, without compensation to [Binkley] other than extending the time for completing the whole work for a period equal to that of such delay or suspension.

(C.A. App. at 177).

This language, of course, permits an extension of time to Williams if delayed by the fault of others, including Remsco and Binkley, but specifically excludes Williams's right to monetary compensation.

The simple, straight-forward language of Article VIII of the Base Contract and paragraph 2 of the Agreement provide more than an adequate basis for the finding by both lower courts that Williams's delay claims are barred by the "no damages for delay" clause.

Williams attempts to avoid application of the clause by arguing that the only portions of the Base Contract incorporated into the Agreement are those referring to the manner in which the work was to be performed. (Petition at 4-13). Williams's argument, relying only on paragraph 1 of the Agreement, simply disregards the controlling language of paragraph 2.

In support of its theory, Williams cites seven cases. Binkley does not dispute the holdings of those authorities, only their applicability. Each decision dealt with language in subcontracts that referred only to the manner in which work was to be performed. In *Guerini Stone Co.* v. *P. J. Carlin Construction Co.*, 240 U.S. 264 (1916), cited by Williams,[4] the Court did rule that the plaintiff was not barred by a "no damages for delay" clause. There, however, the subcontract referred *only* to drawings and specifications, and contained a provision specifically placing on the general contractor, "the obligation to provide all labor and materials not included in this contract in

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[4] Williams argues that the decision of the court of appeals "conflicts" with the opinion of this Court in *Guerini Stone*, probably in an attempt to fall within the comforting language of Rule 19. As noted in the body of this brief, however, *Guerini Stone* is distinguishable on its facts. Moreover, Rule 19(b) only suggests the Court take jurisdiction when a court of appeals has decided a "federal question in a way in conflict with applicable decisions of this court . . ." Manifestly, there is no federal question presented here.

such a manner as not to delay the material progress of the work." 240 U.S. at 278. The other authorities cited by Williams contain similar, even wider, factual disparities from this case: *John W. Johnson, Inc.* v. *Basic Construction Co.*, 429 F.2d 764 (D.C. Cir. 1970) (subcontractor's claims were not barred by extra work provision in prime contract because the incorporation clause referred only to *the work to be performed*); *Washington Metro. Area Transit Auth.* v. *Norair Eng. Corp.*, 553 F.2d 233 (D.C. Cir. 1977) (subcontract did not incorporate arbitration provision from a prime contract since related only to work to be performed); *United States for the use of B's Co.* v. *Cleveland Electric Co. of South Carolina*, 373 F.2d 585 (4th Cir. 1967) (subcontract bound the plaintiff only to *conform to work requirements* in the prime contract); *VNB Mortgage Corp.* v. *Lone Star Industries, Inc.*, 215 Va. 366, 209 S.E.2d 909 (1974) (subcontractor agreed *only to perform work in accordance with drawings and specifications* and comply with the prime contract "as to the work and materials" called for); *Edward E. Morgan Co.* v. *United States*, 230 F.2d 896 (5th Cir. 1956) (subcontract provision relating only to conforming with "specifications" did not incorporate prime contract provision for measurement of crushed rock); *United States* v. *Fryd Construction Co.*, 423 F.2d 980 (5th Cir. 1970) (provision of subcontract referring to prime contract *only referred to work to be performed*, and thus did not incorporate disputes provision of prime contract).

In short, in none of the cases cited by Williams did the subcontract contain language where the subcontractor agreed to assume "all of the obligations and responsibilities" of the prime contractor toward the owner. Similarly, in none of the contracts did the subcontractor agree that the contractor, here Binkley, would have all rights as to Williams which Remsco had against Binkley.

Indeed, those cases that have considered contracts containing this, or similar, language hold that "no damages for delay" clauses are incorporated into the subcontract, barring recovery by the subcontractor.

For example, in *Walter R. Cliffe Co.* v. *Dupont Engineering Co.*, 298 F. 649 (D. Del. 1924), Dupont entered into an agreement with the City of Wilmington for the construction of a marine terminal. As part of this primary contract, the City and Dupont agreed that:

> No charge shall be made by [Dupont] for hinderances or delays from any cause whatever during the progress of any portion of the work contemplated by the specifications, but [Wilmington] may grant an extension of time for the completion of the work . . .

298 F. at 650.

The subcontract between Dupont and the plaintiff provided in Article 4, "the subcontractor agrees to assume toward the contractor all the obligations and responsibilities, so far as applicable to this subcontract, that the contractor, by its contract, assumes toward [Wilmington]." *Id.* This language, of course, is all but identical to the first clause of paragraph 2 of the Agreement.

Based on the language of the subcontract, the court ruled:

> The plaintiff likewise concedes that, where a subcontractor undertakes the work according to the original contract with the owner, the two contracts form, in effect, but one contract, and that the subcontractor is entitled to the same benefits and bound by the same conditions as the contractor under the original contract, except insofar as the original contract is inconsistent with the subcontract.
>
> . . . [U]nder the broad provisions of articles 3 and 4 of the subcontract, the main contract became part and parcel of the subcontract in so far as their provisions are consistent . . . So standing, the provision of the main contract pre-

> vents the introduction into the subcontract of the implied covenants relied upon [that Dupont would not hinder or delay the plaintiff's work] and sought to be justified by the plaintiff and it relieves the defendant from any damages to which the plaintiff might otherwise, perhaps, be entitled for hinderances or delays caused by the defendant in the completion of the plaintiff's work within the time specified in the subcontract.

298 F. at 651-52. *Cf. Charles Rogers, Inc.* v. *State*, 36 Mich. App. 620, 194 N.W.2d 203 (1971).

The language of Dupont's subcontract relating to the incorporation of provisions of the prime contract are all but identical to paragraph 2 of the Agreement. Williams clearly agreed that Binkley had the same rights as to Williams as Remsco had to Binkley, and, as found by the trial court and the court of appeals, Williams's delay claims are barred by the "no damages for delay" clause contained in Article VIII of the Base Contract.

It is evident that the claims asserted by Williams are delay claims. Indeed, Williams characterizes the claims as such itself (Petition at 18). Binkley readily agrees. Allegations that a subcontractor has been delayed for failure to have a work site ready are uniformly barred by "no damages for delay" clauses. *Merchants Loan & Trust Co.* v. *United States*, 40 Ct. Cl. 117 (1904); *Kent* v. *United States*, 228 F. Supp. 929 (S.D.N.Y. 1964), *aff'd.*, 343 F.2d 349 (2nd Cir. 1965), as are claims founded on a failure to properly administer the contract. *Psaty Fuhrman* v. *Housing Authority*, 76 R.I. 87, 68 A.2d 32 (1949). Similarly, Williams's complaints about storage difficulties are delay claims (C.A. App. at 71-72, 75-76, 103-04), specifically contemplated by the language of Article VIII of the Base Contract-barring claims for obstruction of delay "in the commencement, prosecution or completion of the work." (C.A. App. at 177). These were the factual findings of the trial court, which were affirmed by the court of appeals.

The provisions of the Agreement and the Base Contract are unambiguous and should be given their intended effect. Williams specifically agreed to be bound by and accept all the rights and obligations that Binkley had accepted in its relationship with Remsco. In effect, Williams stood in the shoes of Binkley and had full knowledge of its responsibilities and obligations prior to execution of the Agreement. Williams was well aware of its rights and duties and cannot now be permitted to claim it was not affected by the clear and unambiguous terms of the contract which it executed, indeed sought.

B. Even if some aspects of Williams's claims are for extra work rather than delay, those claims were not submitted in conformance with the terms of the Agreement and are barred.

As noted, Williams characterizes all its claims as delay claims. (Petition at 18). Williams, however, as it did before the court of appeals, argues that if the claims were for "extra work" the parties waived the administrative provisions of the contract which would otherwise bar its tardy claims.

Paragraph 4 of the Agreement provides:

> No alterations or retainages shall be made in the work described herein except upon written order of Binkley; and when so made the value of the work and materials added or omitted shall be computed and determined by [Williams] and Binkley and such determined value shall be added to or deducted from the contract price by change order issued by Binkley. No claims for additional compensation shall be considered or paid unless made in complete compliance with this paragraph and authorized in writing before the work is started. Additional charges will be paid in accordance with the terms of paragraph 3 of this Agreement.

(C.A. App. at 142-43).

Both lower courts found that to the extent that the claims were for extra work, those claims were barred by Williams's failure to comply with the terms of this paragraph. (C.A. App.

at 37). That ruling was not clearly erroneous. Williams offered no evidence that claims due to extra work, other than the five instances noted, were submitted to Binkley in compliance with the terms of the Agreement.

Williams again disregards the terms of the contract, choosing instead to argue that the parties waived the provisions of the extra work clause. (Petition at 13-18). Binkley acknowledges that extra work provisions may be waived by the course of dealings between individuals, but denies a waiver occurred here. The testimony of Williams's own employees indicated that Williams always submitted claims for extra work in writing after approval by Binkley. (C.A. App. at 83-85).

These facts support the factual findings of both lower courts that to the extent Williams's impact costs are the result of "extra work," rather than caused by delay, they were barred by paragraph 4 of the Agreement. The trial court, after consideration of all the evidence, specifically found there was no waiver of the extra work provision. That finding was not clearly erroneous.

C. Even if Williams's claims are not barred by the "no damages for delay" and extra work clauses of the Agreement, the evidence supports the lower courts' factual determinations.

If this Court were to rule that Williams's delay claims are not barred by general application of the terms of the Agreement, the facts adduced at trial amply supported the findings of the lower courts.

1. Williams cannot recover for Binkley's alleged failure to provide a ready work site.

Williams argues that Binkley's reference to an approximate date for the commencement of work, and the fact that the work site was not ready on that date for installation of siding, renders Binkley liable for Williams's delay of 11 months in completing the job. (Petition at 23-27). The trial court found that Wil-

liams's employees were at the site in June and July, and work began in earnest in early August. (C.A. App. at 36). Put simply, the trial court found that there was no breach of contract since Williams was on the site in June. The trial court's decision was amply supported by the evidence, as the court of appeals concluded, and was not clearly erroneous.

Moreover, the Agreement did not state that the Project would be ready for application of metal siding, or for any other purpose on June 26, 1978 -- only that "work [was] to commence approximately the week of June 26, 1978." (C.A. App. at 141). Williams's duties under the Agreement encompassed far more than applying siding to the building. Williams was to receive all materials, provide storage locations, obtain permits, insurance, and inspect the project prior to scheduling the siding for shipment, among many others. (C.A. App. at 140-45). Williams's attempt to attribute an eleven month delay beyond its desired schedule of 45 days to not being ready to hang siding on June 26 is incredible, at best.

Additionally, it is clear that the clause to which Williams points for the June 26th commencement date was referring only to the date on which Binkley had agreed with Remsco that Binkley would begin work. There was no promise that Williams would commence on that day. Article VIII of the Base Contract, already discussed, clearly permitted Remsco to delay commencement of the Project without providing Binkley, or Williams, a monetary remedy. (C.A. App. at 177).

Williams was Binkley's on-site representative. Binkley was to provide materials to the work site; Williams was to provide all labor and supervisory work, and conduct all inspections. Williams knew the condition of the Project well before the alleged commencement date and cannot now claim that Binkley is responsible for the delays caused by others and by Williams itself. All these facts supported the trial court's findings, and

that determination was not clearly erroneous, as the court of appeals affirmed.

2. Williams cannot recover for Binkley's alleged failure to administer its contract.

Williams also argues that Binkley was responsible for Williams's eleven month delay in completing the Project because of its failure to properly administer its contract. (Petition at 20-23). The trial court found there was no showing Binkley had control of, or the right to control, any of the other trades. In fact, Williams did not produce any evidence of Binkley's control, which it had the burden to do. *W. Wright, Inc.* v. *Korshoj Corp.*, 197 Neb. 692, 250 N.W.2d 894 (1974); *Doyle & Russell, Inc.* v. *Webb Pile Driving Corp.*, 215 Va. 698, 194 S.E.2d 719 (1973).

Indeed, the evidence presented demonstrated that the delays were largely caused by the Corps of Engineers (C.A. App. at 67-68), Remsco and the other trades (C.A. App. at 57) for whom Binkley was not responsible.

Williams's real complaint is that Binkley did not assist Williams in its relations with Remsco. Mr. Conover of Williams testified that he had some difficulty contacting Binkley's representative. Mr. Hadley, Binkley's representative, however, testified that he often visited the site to deal with Williams's problems and even suggested methods for resolution of those problems. (C.A. App. at 120, 128, 134). Moreover, it is undisputed that all claims submitted to Binkley in conformance with the Agreement were directed promptly to Remsco. (C.A. App. at 120-22, 128, 130).

The trial court had a unique opportunity to weigh the candor and credibility of these witnesses in conjunction with the supporting documentation. Her decision was not clearly erroneous, and should be left undisturbed as the court of appeals concluded.

3. Binkley was not responsible for Williams's difficulties in storage of materials.

Finally, Williams argues that Binkley breached the Agreement by not altering its schedule for shipping siding, causing Williams's storage problems and increased costs. (Petition at 27-30).

Paragraph 8 of the Agreement provides that if Williams intended to request a specific shipping schedule it had to do so at the time of the execution of the Agreement. (C.A. App. at 144). Williams did not. It was not until two years after completion of the Project and nearly three years after execution of the Agreement that Williams claimed its costs were increased because Binkley did not alter a schedule it had never agreed to.

Binkley had no duty to alter the schedule. Williams had inspected the site prior to commencement of construction and was fully aware of the storage constraints. Indeed, Williams's duties required an inspection, "prior to scheduling the material for shipment to assure that the project is ready and that adequate storage area is available." (C.A. App. at 144).

The trial court and the court of appeals were not clearly erroneous in finding that Williams was responsible for the risk of its own storage problems as the Agreement so clearly allocated that risk.

CONCLUSION

Williams and Binkley entered into a contract in which the duties were clearly delineated. Binkley was to provide metal siding to the job site; Williams was charged with every other aspect of construction. Williams agreed to a "no damages for delay" clause, and to the method in which charges for extra work would be submitted. Williams cannot now claim that these provisions for which it bargained when it submitted its bid to Binkley do not now apply.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

June 2, 1982

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June, 1982, three copies of the Brief for Respondent in Opposition were mailed, postage prepaid, to Peter Paul Mitrano, Esq., 510 King St., Suite 413, Alexandria, Virginia 22314, and to Mark E. Borton, Esq., 11935 Riders Lane, Reston, Virginia 22091, Counsel for the Petitioner. I further certify that all parties required to be served have been served.

Terrence Ney